No. 28.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS.

NINTH CIRCUIT.

April Term, 1892.

WM. H. LAKIN, Plaintiff in Error,

vs.

J. H. ROBERTS, et al., Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

GOODWIN & GOODWIN,

Attorneys for Defendants in Error.

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WM. H. LAKIN,
Plaintiff in Error,
vs.
J. H. ROBERTS, *et al.*,
Defendants in Error.

Statement of the Case.

The statement of the case contained in Brief of Plaintiff in error is correct in the main. Plaintiff claims title to the land by virtue of a patent of the United States issued to the Mammoth Gold Mining Company on the 18th day of May, 1877. The patent on its face purports to convey 4,100 feet of a gold-bearing quartz lode, with 252 and 95–100 acres of surface ground. The line of the lode as indicated on the patent, as well as located and marked upon the surface of the claim, is in a straight line along the west or northwest boun-

dary of the patented tract and within fifty feet of said boundary. And all of said surface tract, except said strip of 50 feet in width, appears from the patent to be, and in fact is, on the east or southeast of said lode and extends some three-fourths of a mile therefrom. The patent purports to have been issued under the provisions of the revised statutes. The portion of the patented premises occupied by the defendants and in controversy here is all one thousand feet distant from the lode line, and 200 feet from Jamison Creek (p. 46). In 1883, for the first time, the Sierra Buttes Gold Mining Company demanded of the citizens of Johnsville that they should pay a nominal rent to the company for the land occupied by them as town lots. The defendant Dolly and *several other* defendants paid from one to five dollars each at that time. At no time prior to said date did any other person or company, claiming to own the said land under said patent, demand any rent of the citizens of said town, nor were any rents thereafter demanded until by this plaintiff in the spring of 1889. That those of defendants, *if any*, who entered upon the land subsequent to 1883, either obtained permission of said Sierra Buttes Company, or entered upon the land within the limits of said town, with the understanding that the said company did not object to

their occupancy so long as the enjoyment of its rights in the premises were not interfered with (p. 33).

But who, other than Dolly, paid rent, or whether or not any person entered after 1883, and if so, who or how many entered with the express permission of the Sierra Buttes Company, or how many under the general repute that the Sierra Buttes Company did not object, does not appear from the record. And the finding on this point is not attacked in plaintiff,s specifications.

On the 17th day of June, 1876, one John Banks entered upon a portion ot the premises in dispute and located the same for resident and farming purposes, and the findings of fact and agreed statement show that whatever interest he acquired thereby passed by mesne conveyances to a portion of said defendants.

ARGUMENT.

Plaintiff contends that defendants became tenants at will by reason of the payment of the nomiual rent in 1883, and virtually asks the Court to presume therefrom that they entered the premises in pursuance of such payment, or if the entry was prior thereto that it be deemed to have been permissive. The authorities, cited to which we have access, do not support this contention.

Haight vs. Greer, 19 Cal. 113 was ejectment. The only evidence was in substance that plaintiff's testator owned the premises prior to defendant's entry; that defendant entered under him and now claims the property and is in possession. Also that plaintiff held letters testimentary. The Court said that was sufficient prima facie to maintain the action. Grace vs. Barclay 106 Penn St. 155 was in assumpsit and the Court held upon the facts that the jury might find the defendant liable on one of the three grounds following: For use and occupation, for storage, or for obstruction of plaintiff's use of property. Title to the realty was not in issue, nor was the doctrine of estoppel discussed.

Larned vs. Hudson, 60 N. Y. 104, was ejectment. The question in the case was whether defendant entered under license or by tenancy. There was no dispute as to title, nor as to the permissive entry.

Jones vs. Shay 50 Cal. 508 was forcible entry and detainer. Plaintiff was in peaceable, actual possession under contract at the time of forcible entry. The Court held that under that state of facts, plaintiffs, though paying no rent, was a tenant at will, and could therefore maintain that character of action. The other authorities cited are not at hand.

We do not question the proposition that a tenant receiving possession of the land of another under a contract to hold it for an indefinite period, becomes a tenant at will, and if not within certain exceptions is estopped from setting up title during such holding. But the facts of this case fall far short of bringing defendants within the general rule.

"Estoppels are odious because thereby a man "is concluded to say the truth, and therefore the "law does not favor them."

Franklin vs. Merida, 35 Cal. 558.

A tenancy at will can not arise without an actual grant or contract.

1st Washburn on Real Pro. 504.
Blum vs. Robertson, 24 Cal. 145.

That O. B. Dolly and "*several other defendants*" paid a nominal rent in 1883 is the fact relied upon to create the estoppel. All else necessary to make the contract, the entry into possession at that time, or if prior, that the entry was in subordination to plaintiff's title, will be conclusively presumed says plaintiff. This is urged in face of the finding of the Court that Defendant Dolly and several other defendants, were in possession of their several lots when such rent was paid. That Banks located the plat in 1876 with all the

notoriety practicable, that he occupied it immediately by erecting large buildings for business and trade thereon; that the town grew to its present dimensions in population within three years from that time. That whatever right Banks had acquired passed by mesne conveyances to some of defendants. That no one objected to their occupancy or questioned their right so to occupy the same until 1883; that the location and occupancy bordered on, and from the record, recognized the boundaries of the old Mammoth Company as then notoriously held by said company.

But plaintiff says Banks did not, nor could those entering and holding under him thus acquire any rights or possessions entitled to respect. To this there are two answers:

1st. The rights of neither Banks nor the defendants holding under him are in issue here. Plaintiff must recover, if at all, upon the strength of his own title.

2nd. The law contemplates the building of just such towns as Johnsville upon mineral lands adjacent to valuable mines.

Weeks on Mineral Lands, Secs. 221-2.

These facts can leave no room for presumptions in support of the estoppel upon which plaintiff relies. The burthen is on him to show clearly, not

only the contract of tenancy, but also that defendant took possession under it.

Tewksbury vs. Magraff, 33 Cal., 237.

Franklin vs. Merida, 35 Cal., 566.

As to the defendants who entered since 1883, if any, some entered by permission and others under the common repute that the Sierra Buttes Company would not object. Long prior to 1883, the town was of the same size as now, with all of its streets, blocks and lots, as shown by the plat, and occupied by the same number of people. (p. 32) And it is admitted that during all of this time, none of the said town was possessed by plaintiff or his grantors. It would necessarily follow that those who have entered since 1883, if any, simply took the place of the prior occupants who held under Banks, and it matters not whether they entered under permission of the Sierra Buttes Company or under the general repute of the said Company's likes and dislikes in the matter. But who and how many entered by permission, and how many under general repute? It devolves upon plaintiff to show these matters, but we find the record entirely silent in relation to them. They also would have to be presumed to enable the Court to render judgment in accordance with plaintiff's contention.

But it does clearly appear that whatever recognition of plaintiff's title was made was under the mistaken idea that plaintiff had title, and whatever rent was paid was by parties already in possession, so in either case defendants are brought clearly within the exceptions to the general rule, as laid down in

Tewksbury vs. Magraff, 33 Cal., 341.

Franklin vs. Meridia, 35 Cal., 575.

Schultz vs. Elliott, 11 Humph., 187.

Miller vs. McBrier, 1 Serg. & R., 382.

Swift vs. Dean, 11 Vt., 323.

Carter vs. Marshal, 72 Ill., 609.

The contention that to defeat plaintiff's title defendants must show title in themselves has no warrant in reason and no fair construction of the authortties will support it.

Peralta vs. Guirchino, 47 Cal., 460, cited by plaintiff, holds that title in plaintiff cannot be defeated by averment, but proof is required on defendant's part; and that the plaintiff, by producing a lease to defendant, makes a prima facie case. The other language of the decision must be construed in the light of the issues in the case. The action was unlawful detainer. Plaintiff alleged that defendant held as her tenant, and defendant

claimed that he was holding as the assignee of a lease from other parties.

Abbey Homestead Ass. vs. Willard, 48 Cal., 618. was ejectment. The defense was adverse possession. It appeared at the trial that shortly before suit was brought defendant had leased the premises of plaintiff. The learned council for plaintiff in that case conceded that "defendant "might have shown that plaintiff had no title (p. "617), and the decision does not hold to the con- "trary."

In Diffiback vs. Hawk, 115 U. S., 392, the defendant relied upon his adverse holding at the time patent was issued to defeat it. The decision is against such contention. It does hold, however, that mineral lands may be included in a townsite patent, but that the patent would be inoperative as to such as were known at the time to be valuable for their mineral.

In Reynolds vs Iron Silver Mining Co., 116 U. S., 687, which is a case arising upon the exception from a Placer Patent of all known veins of rock in place bearing gold, silver, etc., and in which defendants relied solely upon the fact that the ledge was known to exist at the time patent was issued to the Placer claimants, the Court says, in reference to one of defendant's instructions: "The

"conflict in principal between the instructions "asked and refused, and those given by the "Court, is marked and easily discerned and pre- "sents the only question in the case. Its primary "form is presented by the fourth of the defend- "ants requests, namely, 'that plaintiff m ist re- "cover on the strength of his own title.' This is "the fundamental principle on which all actions "of ejectment or actions to recover the posses- "sion of real estate rest even where the plaintiff "recovers on proof of priority of possession, it is "because, in the absence of any title in any one "else, this is evidence of title in plaintiff. If "there is any exception to the rule, that in an "action to recover possession of land, the plain- "tiff must recover on strength of his own title, "and that the defendant in possession can law- "fully say, until you show some title, you have "no right to disturb me; it has not been pointed "out to us."

Doolan vs. Carr, 125 U. S., 620, is to the same effect. In this case the point is emphasized by the dissenting opinion of the Chief Justice, based upon the fact that defendant was so attacking the patent without showing any right in himself.

Construction of Revised Statutes.

The patent in question is void upon its face as to all of the surface ground on the east or southeast of the lode as marked thereon, in excess of three hundred feet from the center of said lode.

The sections of the Revised Statutes in relation thereto, are as follows: Section 2318, "In all "cases, lands valuable for minerals shall be re "reserved from sale except as otherwise expressly "directed by law."

Section 2320, "Mining claims upon veins or "lodes of quartz or other rock in place bearing "gold, silver, etc., *heretofore located* shall be gov- "erned *as to the length along the vein or lode, by "the customs, regulations and laws in force at the "date of their location.* A mining claim located "*after* the tenth day of May, 1872, whether lo- "cated by one or more persons, may equal, but "shall not exceed one thousand five hundred feet "in length along the vein or lode, but no location "of a mining claim shall be made until the dis- "covery of the vein or lode within the limits of "the claim located. *No claim* shall extend more "than three hundred feet on each side of the mid- "dle of the vein at the surface; nor shall any "claim be limited by any mining regulations to "less than twenty-five feet on each side of the

"middle of the vein at the surface, *except where* "*adverse rights existing on the tenth day of May,* "*eighteen hundred and seventy-two, render such* "*limitation necessary.*"

There should be no question as to the purpose of these provisions. They clearly restrict the sale of the precious metal mines to prescribed conditions and in distinct limited quantities. The claim must be segregated by location from the mass of mineral lands, and all conditions of the status must exist and be complied with before the Land Department has the jurisdiction to sell or the claimant the right to buy the claim in question.

In construing Section 2320 we can do no better than incorporate the clear and concise language of the learned judge who tried and decided this case in the Circuit Court, as appears in his written opinion at page 37 *et sequor.* "The entire "Section seems to be clear, definite, and certain. "It provides that all mining claims upon quartz "lodes located *prior to its* passage should be "governed as to the length of the claim along the "lode, by *customs, regulations,* and laws in force "at the date of their location; that the claims "located *after* the 10th day of May, 1872, may "equal, but shall not exceed one thousand five

"hundred feet in length along the vein or lode.
"So far the Section relates solely to the question
"of the length of the lode that may be located.
"It next takes up the question as to how much
"surface ground will be allowed to a locator of a
"quartz lode, and says that *no claim*, evidently
"meaning all claims, whether coming within the
"first clause relating to claims located prior to
"the passage of this Section, or within the second
"clause relating to locations made subsequent
"thereto, 'shall extend more than three hundred
"feet on each side of the middle of the vein at
"the surface.' Having thus expressed the extent
"of the surface ground to which the locator may
"be entitled, it further provides that the amount
"of surface ground, shall not, in any case, be
"limited by any mining regulations to less than
"twenty-five feet on each side of the middle of the
"vein at the surface, except where adverse rights,
"existing on the 10th day of May, 1892, render
"such limitations necessary."

This construction of the statute is certainly correct, and it necessarily follows therefrom that after the passage of the Act of which this section is a part, the land department has no jurisdiction, power or authority, to issue a patent for a quartz lode to any surface ground in excess of three

hundred feet in width on each side of the center of the lode, and that any patent issued for more than that amount of surface ground is absolutely null and void, as to the excess over three hundred feet, and can be collaterally attacked in a court of law. For, as is announced by Mr. Justice Miller in delivering the opinion of the Court in Doolan vs. Carr, 125 U. S. 624, "There is no question as "to the principal that when the officers of the "Government have issued a patent in due form "of law, which on its face is sufficient to convey "the title to the land described in it, such patent "is to be treated as valid in actions at law, as "distinguished from suits in equity, subject, how-"ever, at all times to the inquiry whether such "officer had the lawful authority to make a con-"veyance of the title. But if those officers acted "without authority, if the land which they pur-"ported to convey had never been within their "control, or had been withdrawn from that con-"trol at the time they undertook to exercise such "authority, then their act was void, void for want "of power in them to act on the subject matter of "the patent, not merely voidable, in which latter "case, if the circumstances justified such a decree, "a direct proceeding with proper averments and "evidence would be required to establish that it "was avoidable and should therefore be avoided.

"The distinction is a manifest one, although the "circumstances that enter into it are not always "easily defined. It is nevertheless a clear distinc- "tion, established by law, and it has often been "asserted in this Court that even a patent from "the Government of the United States, issued "with all the forms of law, may be shown to be "void by extruisic evidence, if it be such evidence "as by its nature is capable of showing a want of "authority for its issue."

The same proposition of law is announced with force and clearness in the following authorities:

Polk Lessee vs. Wendall, 9 Crauch 87.

New Orleans vs. United States, 10 Pet. 662, 730.

Wilcox vs. Jackson McConnell, 13 Pet. 498.

Stoddard vs. Chambers, 2 Howard 284, 317.

Easton vs. Salisbury, 21 Howard 426-428.

Reichart vs. Felps, 6 Wall 160.

Best vs. Polk, 6 Wall, 112-117.

Eleavenworth Railroad vs. United States, 92 U. S. 733.

New Hall vs. Sanger, 92 U. S. 761.

Sherman vs. Buick, 93 U. S. 209.

Smelting Co. vs. Kemp, 104 U. S. 636.

Steel vs. Smelting Co., 106 U. S. 447.

Kansas Pacific Railway Co. vs. Dunmeir, 113 U. S. 629.

Reynolds vs. Iron Silver Mining Co., 116 U. S. 687.

In Smelting Co. vs. Kemp, 104 U. S. 636, the patent was regular upon its face. "unless some "limitation in the law as to the extent of a mining "claim which can be patented, has been disre- "garded." In rendering the opinion Mr. Justice Field, quoting from Pattison vs. Winn, 11 Wheaton 380, says, "that if a patent was issued without "authority, or was prohibited by statute * * * "it could be impeached collaterally in a court of "law in an action of ejectment." In explanation of the phrase "that if the patent be absolutely void on its face, it may be attacked collaterally, impeached in a court of law," the learned Justice, delivering the opinion of the Court, said: "It is "meant that the patent is seen to be invalid, "either when read in the light of existing law, or "by reason of what the Court must take judicial "notice of; as for instance * * * that the "patent is for an unauthorized amount."

This is a full recognition of the principle contended for by defendants.

In Parleys Park Mining Co. vs. Kerr, 130 U. S. 261, the question was presented whether the patent issued for a quartz lode was void because it embraced more than 200 feet in width of surface ground. In commenting upon this case Judge Hawley says (p. 39): "There it was shown "that the rules aodpted on the 17th day of May "by the miners of the district, when the lode was "located, provided 'that the surface width of any "mining location shall not exceed one hundred "feet in width on each side of the wall rocks of "said lode.' But it also appeared that in antici- "pation of the Act of Congress of May 10th, "1872 (Sec. 2326 Rev. Stat.), there was a meet- "ing of miners held in said district on the 4th day "of May, 1872, and the rules of the district were "altered and amended so as to provide that 'the "surface width shall be governed by the laws of "the United States of America,' and the Court "very properly held that in *view of the testimony* "the Land Department had a right to determine "which of these rules were in force." In other words, they held that the finding of the Land Department was *sustained by the* evidence. "What "the result of the opinion would have been if

"there had been no amendment to the mining "rules is made clear by the language of the "Court in its reference to the rules and regula- "tions of the miners adopted in 1870 limiting the "surface ground to 200 feet. Upon this point "the Court said: 'Had that regulation remained "in existence and been in operation at the time "the Clara claim was located, its effect upon the "legality and validity of that location, at least as "to all the land in excess of two hundred feet, "could not be doubted."

It is a necessary conclusion that if the foregoing construction of the Revised Statute is correct and the authorities cited applicable to our contention, the patent in question, in so far as it includes ground in excess of 300 feet, on each side of the lode line as designated upon the same, was issued without authority of law, and therefore void.

We assent to the proposition that, as a general rule, courts do not favor such constructions of statutes as will make them retroactive and thereby trench upon vested rights. But in this case the matter is not left for construction; it is the express enactment of the legislative power, expressing their intent to restrict surface grants to 600 feet, in language as plain and unequivical as it was possible to use and pay any attention to the accepted rules of rhetoric.

But the construction of Section 2320 Revised Statutes, which we urge upon the attention of the Court, does not militate against, or affect in any manner any vested right of plaintiff's grantors in the townsite of Johnsville. The only rights they had at the time of this Congressional enactment was the original Mammoth Holding, which includes no portion of the land in controversy here, and the *lode line* of the extension. For the Court finds that there was no local law or rule authorizing the possession of this tract of surface land by them, and that, as a fact, they never actually possessed it (pp. 29–30). It seems to us that it would be a perversion of every principle of law upon this subject to hold that simply by a survey of this large tract in connection with the patent proceedings, they acquired a vested right in it.

In Deffinbeck vs. Hawk, 115 U. S. 402, the Court says: "No reference can be had to the "original statutes, to control the construction of "any section of the Revised Statutes, when the "meaning is plain, although in the original statutes "it may have had a larger or more limited appli- "cation that that given to it in the revision."

Local Customs, Rules Etc.

The patent in question must be viewed by the Court in light of the fact that the local customs in

Jamison Mining District limited the amount of surface ground to be taken in connection with the quartz lode to one hundred feet on each side thereof. This is found as a fact by the Court, (p. 29) and the finding is supported by the evidence, (pp. 58, 59).

Speaking of local mining rules and regulations, the Court, in Smelting Co. vs. Kemp, 104 U. S. 649, through Justice Field, says: "Soon after the "discovery of gold in California, as is well known, "there was an immense immigration of gold "seekers into that territory. They spread over "the mineral regions and probed the earth in all "directions in pursuit of the precious metals. "Wherever they went they framed rules prescrib- "ing the conditions upon which mining ground "might be taken up, in other words, mining "claims be located, and their continued possession "secured. These rules were so framed as to "give to all immigrants absolute equality of right "and privilege. The extent of ground which "each might locate, that is, appropriate to him- "self, was limited, so that all might, in the homely "and expressive language of the day, have an "equal chance in the struggle for the wealth "there buried in the earth. * * * The rules "and regulations originally established in Cali-

"fornia, have in their general features been "adopted throughout all the mining regions of "the United States. They were so wisely framed "and fair in their operation, that they have not, "to any great extent, been interfered with by "legislation, either state or national.

"In the first mining statute passed July 9th, "1866, they received the recognition and sanction "of Congress, as they had previously the legisla- "tures of the states and territories in which "mines of gold and silver were found." This is a clear and most authoritative statement of the origin, existence and general scope of an immense body of the laws of this land.

In the case of Morton vs. Solambo C. M. Co., 26 Cal. 533, in discussing the potency of these laws, the Court say: "Having received the sanc- "tion of the Legislature, they become as much a "part of the law of the land, as the common law "itself, which was not adopted in a more solemn "manner.

Would a custom limiting lode locations to twenty or thirty feet along the vein, and allowing ¾ of a mile of surface, and that being, all but fifty feet, on one side thereof, ever called forth such eulogies as these above quoted. We say no. It was because of this high estimate of the justice

and efficacy of these laws, as known to exist and interpreted by the Courts, that Congress made them the tenure by which gold mines should be held and sold.

Section 2 of the Act of 1866 provides, "That "whenever any person or association of persons, "claim a vein or lode of quartz or other rock in "place bearing gold, silver, cinnabar or copper, "*having previously occupied and improved the same* "*according to the local customs or rules of miners* "in the district where the same is situated * * * "it shall be lawful for said claimant * * * to "file in the local land office a diagram of the "same, conformed to the local laws, customs and "rules of miners and to enter such tract and re- "ceive a patent therefor."

This recognition by Congress of the local rules of miners in the several districts, make them a part and parcel of the statutes, and occupying the mine in accordance with their provisions, is an antecedent condition to the sale of any mineral land, and until so occupied the land department has no jurisdiction, power or authority to dispose of the same.

In Section 4 of the same Act, Congress provides that *surface* ground may be disposed of in accordance with the local rules. Again express-

ing its intent to have them control their grants. All mineral land not so held is as clearly reserved from sale under the provisions of Section 2318, construed in connection with the other statutes, as is possible for lauguage to express.

As stated above, it is found that the surface ground in dispute was never possessed or located as an incident to the quartz lode patented, and also that there was no local rule by which it could have been. It follows then that the patent is void, void for want of authority in the land officers to make the grant, having never acquired jurisdiction of the subject matter of the grant.

But plaintiff contends that the patent conclusively proves the existence of local customs and rules of miners in that district compatible with the dimensions of the tract described. We fully concede the conclusiveness of a patent as to all matter of mere form in the procedure leading up to the issuance of it, and the necessity for such a rule. But matters which the law makes jurisdictional, facts which must exist under the law before such land can be sold, do not come within the rule. The patent is but the final step in a series of steps taken by the department. It is the final judgment of that "Court" that it has the power to convey, and does convey to the patentee, the given tract. The law, in all cases, declares what

lands may be sold, and the antecedent conditions upon which the department may convey them, and the conveyance when executed, carries with it the presumption that the officers have done their duty, but such presumption is never conclusive as to the *power and authority* to act.

The Supreme Court of the United States, in case of New Orleans vs. United States, 10 Peters, 731, say, in discussing the validity of certain grants from the King of Spain to certain lots in the water front of that city: "It would be a dan-"gerous doctrine to consider the *issuing of a* "*grant* as conclusive evidence of right in the "power which issued."

Wepples Proceedings in Rem., Sec. 568.

McMann vs. Whelan, 27 Cal., 313.

Hyde vs. Kedding, 74 Cal., 493.

In the case of Doolan vs. Carr, 125 U. S., 620, cited above, this question is elaborately discussed, and the authorities upon which our contention rests, cited and approved. The patent in that case was regular upon its face, and carried with it the presumption that in issuing it the officers of the Land Department had performed their duty. It showed upon its face to have been founded upon a valid grant. It was admitted by the character of the defense to have been public land of

the United States at the time of the grant and issuance of patent, and also of a class and character of land contemplated by the grant. Defendant relied upon the *fact*, that at the time of the grant the land described in the patent was within the exterior boundaries of a large tract, out of which a small Spanish grant was to be carved, and for that reason reserved from sale, and therefore the department had no power to issue the patent. Not only was this defense sustained, but the case holds that the identity and location of the land within the exterior limits of the larger tract could be shown by oral testimony.

Under these authorities, it is difficult to conceive a case in which a defendant may not show the fact, where the officers issuing a patent have acted without authority of express law, and in view of them all, it cannot be said that a mining patent is conclusive evidence of the existence of mining rules and their contents. True, these laws so justly eulogized by Justice Field and sanctioned and upheld by all the Courts, do not, like statutes, come within the judicial knowledge of the Courts, but when shown to exist as a fact, they become a portion of the existing law referred to in Smelting Co. vs. Kemp, 104 U. S., 636, and must control the Court in passing upon the va-

ladity of a grant as absolutely as the most solemn enactment of a legislative body.

In placer mineral patents the department regulations require the land officers to ascertain before issuing them whether any quartz lodes are known to exist within the boundaries of the placer claim. It may and often is determined *as a fact* by the Land Department that no such lode exists, but such investigation and determination will in no wise control or limit the right of any one authorized to mine to go upon the patented placer claim, and work a quartz lode known to exist therein at the time of issuing patent. If, in such case, the quartz miner is sought to be ejected, all he has to do is to show by oral testimony that the lode was known to exist at the date of patent, and ejectment fails.

Reynolds vs. Iron Silver M. Co., 116 U. S. 687.

In Iron and Silver Mining Co. vs. Campbell, 135 U. S. 286, the question arose as to the conclusiveness of a patent for a quartz lode upon land which had been previously patented as a placer mine. The holder of the Junior Quartz patent contended that the patent was conclusive of the fact that the lode was known to exist at the time the placer patent was issued. The Court below

held with this contention, but the Supreme Court reverses the decision, holding that the *two facts*, the existence of the vein, and the knowledge of its existence to the party applying for the placer patent, are always and ultimately a question of judicial cognizance.

Want Of Notice.

We say the department had no authority to issue this patent because it gave no notice of the application or intention to apply for it.

The law provided, "That upon the filing of the "diagram * * * the Register of the land "office shall publish a notice of the same in a "newspaper published nearest the location of said "claim * * * for the period of ninety days "* * * and after the expiration of said period "it shall be the duty of the Surveyor General to "survey, etc."

The notice to be given is of the filing in his office and posting of notice and diagram required of the applicant. It is the summons which this officer must issue and serve before he can possibly acquire the right or power to determine the applicant's claim to a patent. We do not find where this point has been discussed by the Courts; but the Secretary of the Interior, in the

Antelope Patent Case, Sickles Mining Laws, 174, says, "Congress, in my opinion, never intended "that a patent should issue for any mineral lands "where an application for patent had not first "been advertised and notice given * * * a "construction that would result in such conse- "quences is inadmissible." It would result in de- "stroying every safeguard which Congress in- "tended to throw around the sale of the mines."

In the same opinion at Id. 162, he holds that the application and published notice are jurisdictional, and that a patent cannot issue lawfully in excess of them. This would seem to be elementary, if the proceedings of the department under this statute have any analogy to other tribunals to determine rights.

In this connection we call the Court's attention to the application and notice (p. 9).

The Register gave no notice. McGee & Thompson, over their own names, caused the notice which we have above referred to, to be posted and published and did so before going to the land office.

The Attorney General of the United States, in an opinion found at page 177–8, Sickles Mining Laws, says the law makes it the legal duty of the Register to prepare and give notice.

For this additional reason the Land Department never acquired jurisdiction of the subject matter of the grant.

Plaintiff has specified a great many errors of law committed by the trial Court, and several particulars in which he claims the findings unsupported by the evidence, but in his brief he virtually concedes that if the main propositions for which he contends are not maintainable, the errors complained of have not affected his material rights. The findings are all supported by the evidence and if our contentions are sound law the Court has made no errors.

We submit that the judgment of the Court below is just and in accordance with law, and should be affirmed.

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